

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

WOMEN'S HEALTH ORGANIZATION
ON BEHALF OF ITSELF AND ITS PATIENTS PLAINTIFFS
VS. CIVIL NO. 3:18-cv-00171-CWR-FKB
M.D., M.P.H., MARY CURRIER, ET AL. DEFENDANTS

HEARING ON THE MOTION FOR TRO

BEFORE THE HONORABLE CARLTON W. REEVES
UNITED STATES DISTRICT JUDGE
MARCH 20, 2018
JACKSON, MISSISSIPPI

APPEARANCES:

FOR THE PLAINTIFF VIA TELEPHONE: MR. ROBERT B. MCDUFF
MS. CHRISTINE PARKER
MS. HILLARY SCHNELLER

FOR THE DEFENDANT: MR. PAUL E. BARNES
MR. WILSON E. MINOR

REPORTED BY: CHERIE GALLASPY BOND
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1 THE CLERK: Before the court this morning is case
2 styled and numbered *Jackson Woman's Health Organization, et*
3 *al., v. M.D., M.P.H., Mary Currier, et al,* civil action number
4 3:18cv171-CWR-FKB.

5 THE COURT: Good morning. I'm having some technical
6 difficulty. Bear with me for just a second.

7 (Short Pause)

8 THE COURT: It's my understanding that we have for the
9 plaintiff attorneys Rob McDuff, Hillary Schneller, and
10 Christine Parker. Is that correct?

11 MR. MCDUFF: That's correct, Your Honor.

12 THE COURT: I just wanted to make sure you all can
13 hear me. Are you having any difficulty hearing me and
14 understanding me?

15 MR. MCDUFF: I'm not.

16 MS. SCHNELLER: We can hear you. Thank you.

17 THE COURT: Who are you? I'm sorry.

18 MS. SCHNELLER: I apologize. This is Hillary
19 Schneller.

20 THE COURT: Who will be arguing on behalf of the
21 plaintiff?

22 MR. MCDUFF: I will, Your Honor.

23 THE COURT: Okay. Thank you. And for the State, I
24 have Mr. Barnes and Mr. Minor. Is that correct?

25 MR. BARNES: That's correct, Your Honor.

1 THE COURT: Are we ready to proceed then, Mr. McDuff?

2 MR. MCDUFF: We are, Your Honor.

3 THE COURT: You may proceed.

4 MR. MCDUFF: Thank you very much, Your Honor, and
5 thank you for accommodating me. I am not in Jackson this
6 morning and would have a very difficult time getting back there
7 so I appreciate you allowing me to participate by telephone.

8 Yesterday afternoon around 3:30 the governor signed
9 House Bill 1510 that prohibits women who are beyond the
10 15th week -- who are beyond the 15th week of pregnancy from
11 making their own decisions about whether to bear children.
12 Within an hour after the law was signed, we filed this
13 challenge to the constitutionality of that bill, and we filed
14 it on behalf of the Jackson Women's Health Organization and its
15 medical director.

16 Within -- about 7 p.m., we filed a motion for a
17 temporary restraining order seeking an immediate order this
18 morning that would prevent the law from remaining in effect.
19 By its terms, it took effect immediately. Prior to the filing
20 of the lawsuit, I informed the Attorney General that we were
21 about to file it, and I informed them of the basic points we
22 would be making in our motion for temporary restraining order.

23 This afternoon at 2 p.m., the clinic is seeing a
24 patient who is just beyond the 15th week of pregnancy. If the
25 temporary restraining order is not issued, they will have to

1 turn her away, and the next opportunity there would be for an
2 appointment for her with a doctor present would be eight days
3 from now at which point she would have entered the 16th week of
4 pregnancy and the clinic does not perform abortions after 16
5 weeks. So this is her only opportunity to have treatment at
6 the clinic.

7 THE COURT: Let me -- Mr. McDuff, let me ask this
8 question, and I apologize for interrupting you. Why does she
9 have to wait another eight days if she's turned around today?

10 MR. MCDUFF: Because the clinic does not have a doctor
11 present who can perform the procedure until eight days from
12 now. The schedule is they've got doctors that come in from out
13 of state, and they have only certain days each week in which
14 procedures are performed, and the next date is eight days from
15 now.

16 THE COURT: Okay. Thank you. I'm sorry. Let me ask
17 you this. In reading your papers, has that patient fulfilled
18 the initial obligation of having the 24-hour wait period or
19 whatever she has to -- she has to have that first consultation
20 first. Right?

21 MR. MCDUFF: Yes, and she has.

22 THE COURT: Okay.

23 MR. MCDUFF: Under existing law in Mississippi,
24 abortions are banned after 20 weeks. Now, that statute we
25 believe is unconstitutional, but because no one in Mississippi

1 is performing abortions past the 20th week, there has been no
2 occasion to challenge it. But with this particular bill that
3 we are confronting today, the clinic does have standing and
4 does have reason to challenge it because it does perform
5 abortions after 16 weeks.

6 And the Supreme Court has held beginning in 1972 with
7 *Roe v. Wade* and again in 1992 in *Planned Parenthood v. Casey*
8 and again in 2016 in the *Hillerstedt* case from Texas, that a
9 state may not prohibit anyone from making the ultimate decision
10 to terminate her pregnancy before viability. And viability has
11 been defined as the point at which the fetus could be
12 maintained -- his life could be maintained and nourished
13 outside the woman.

14 The declaration of Dr. Carr-Ellis, who is the clinic's
15 medical director and is one of the plaintiffs, states that
16 fetal viability does not occur at 15 weeks. It occurs in
17 normal pregnancies at around 23 weeks. The Supreme Court in
18 the *Planned Parenthood v. Casey* case tells that fetal viability
19 "sometimes" occurs as early as "23 to 24 weeks."

20 The cases that we have cited from the Ninth Circuit,
21 *Isaacson v. Horne*, states that viability occurs well after 20
22 weeks gestation. The Eighth Circuit in the *MKB Management Corp*
23 case states -- credits the plaintiff's expert declarations that
24 state viability occurs at about 24 weeks.

25 There has been no case in which a law like this

1 setting a ban at some point prior to viability has been upheld
2 on the merits in the face of the constitutional challenge. We
3 have listed in our brief a number of federal court of appeals
4 and state supreme court decisions in which decisions -- in
5 which the laws banning procedures prior to viability had been
6 struck down and each of them has either been affirmed by the
7 United States Supreme Court or the Supreme Court has denied
8 review. These include laws struck down that had bans of
9 abortions past 22 weeks, past 20 weeks, past 12 weeks and past
10 six weeks.

11 So it's very clear under the existing law that women
12 have a right to make their own decisions about whether or not
13 to bear children even after 15 weeks of pregnancy and all the
14 way up to viability. This law is clearly unconstitutional.

15 There's clearly irreparable harm here if a temporary
16 restraining order is not issued, and for those reasons we
17 respectfully request that the court issue a temporary
18 restraining order as soon as possible this morning. That's all
19 I have, Your Honor.

20 THE COURT: Thank you. Any response from the State,
21 Mr. Barnes? The State has -- I want to make sure the State has
22 not filed any papers yet. Is that correct?

23 MR. BARNES: That's correct, Your Honor.

24 THE COURT: Okay.

25 MR. BARNES: May it please the court?

1 THE COURT: You may proceed.

2 MR. BARNES: Your Honor, I think it's important to
3 note from the outset that we are here on the TRO motion only.
4 The merits of the case only need to be developed to the extent
5 the court has to consider likelihood of success. And the
6 reason we are here right now is because of the one woman who
7 has got a procedure scheduled this afternoon.

8 So I'm going to focus my argument on really three
9 issues. One is the burden of proof and standing. Second,
10 possibility of irreparable harm. And as part of that, I'm
11 going to concentrate on the harms that the law is intended to
12 protect. And then third, the State's interest in the
13 protection of unborn life.

14 It's the marriage of those two and the interest of
15 protecting maternal health and the State's interest in
16 protecting unborn life that ultimately is underpinning
17 justification for this law.

18 The clinic has said they only perform procedures
19 through 16 weeks. That's been represented to us in other cases
20 and here today. So we're not talking about week 17, 18 and 19.
21 They don't do procedures after the 16th week. So in our view,
22 the court should be looking only at the week -- the 16th week,
23 which is the one week that could affect the clinic's operation.

24 Now, the burden of proof in an abortion case is on the
25 plaintiffs, both legally and factually, and the undue burden

1 test has teeth. As Judge Jordan's ruling last week on the
2 ob-gyn certification issue shows, plaintiffs cannot simply
3 offer rhetoric or general evidence. They must come forward
4 with substantial evidence to meet their burden.

5 So if we -- if they don't do procedures after 16
6 weeks, there's no reason to delve into the other weeks. And
7 it's important for the court to know until the passage of this
8 bill under the 20-week law, that was purely a decision of the
9 clinic. That's their business model. The clinic chooses not
10 to perform abortions after the 16th week, and the reason they
11 choose not to do it is because abortions after the 16th week
12 are riskier and because they require more personnel.

13 Generally an anesthesiologist is considered necessary
14 in order to -- in case general anesthesia is necessary. The
15 procedures are more complicated. So we think the fact that the
16 clinic chooses not to perform abortions or procedures after the
17 16th week is tacit admission of part of our argument.

18 Now, this law has a number of stated purposes, and
19 legislative findings and statements of legislative purpose are
20 entitled to substantial deference. The Supreme Court has said,
21 however, they're not entitled to dispositive weight, but they
22 can't simply be discarded, and we think that's very important
23 in this case.

24 THE COURT: Did the legislature have any hearings on
25 this legislation -- any hearings that had been reduced to

1 transcripts or writing of the proceedings? And I know
2 typically they do not.

3 MR. BARNES: Not to my knowledge, Your Honor, but I do
4 not know for certain.

5 THE COURT: Do you know if they had hearings? Because
6 that was a compound question.

7 MR. BARNES: I do not know, Your Honor.

8 THE COURT: Okay. All right. So if they didn't have
9 hearings, how much deference should I give anything that
10 they -- any of the justifications that they set out or their
11 findings that they set out in the statute, how much deference
12 should the court give it if they had no hearings?

13 MR. BARNES: Your Honor, still substantial deference.
14 That goes into the court. The court does have an independent
15 inquiry obligation under the current law, but even if hearings
16 are not -- are not held, those findings are still entitled to
17 substantial difference. And in addition to the findings which
18 are described in the bill, which I want to talk through a few
19 of those, there also is one particular peer reviewed article
20 which is cited in the statute itself and which we would also
21 like to make -- first I'd like to make an exhibit a copy of the
22 HB1510 and second -- and then second I would like to make an
23 exhibit the article that is cited --

24 THE COURT: I know you and Mr. McDuff have talked
25 about these proceedings today. Do the plaintiffs have -- have

1 you given them a copy of that?

2 MR. BARNES: I don't know that I have, not overnight
3 Your Honor. I assume they have a copy, but I'm not going to go
4 into great detail. I just want to get into the effort --

5 THE COURT: It's labeled "Risk Factors for Legal
6 Induced Abortion Mortality in the United States," an article by
7 several doctors, Linda Bartlett, Cynthia Berg, et al. If you
8 don't have it, Mr. McDuff, I imagine the State will get it to
9 you.

10 MR. BARNES: Absolutely we will, Your Honor.

11 MR. MCDUFF: Your Honor, we had no objection to you
12 considering it for whatever weight it's worth at this stage.
13 We do not -- this is not a -- however we might object to it in
14 the future depending on the context. I want to reserve that
15 right if it's introduced at any further hearings.

16 THE COURT: All right. Thank you. That objection
17 will be noted. You may proceed, Mr. Barnes.

18 MR. BARNES: Thank you, Your Honor. The reason I want
19 to make this an exhibit is because this article does support a
20 number of the legislative findings that are described in the
21 bill itself, and it's specifically cited on lines 62 through 65
22 of the bill.

23 And one of the things that the plaintiffs and their
24 experts cannot deny is that the risk is -- greater factor of
25 determining a risk in gestational age after the eighth week,

1 the risk related to having an abortion increases approximately
2 38 percent per week. So, therefore, an abortion being
3 performed at the 12th week, 13th week, the 14th week, the
4 15th week, each of those weeks, the risk goes up.

5 We anticipate that their argument -- and
6 Dr. Carr-Ellis says in her declaration that it's still a safe
7 number. That's an ultimate issue of fact that the court's
8 going to have to determine in this litigation. She does not
9 dispute -- her declaration does not dispute that there is
10 increased -- that harm is one. Harm is what this bill is
11 intended to protect against, excuse me.

12 And some of those findings, Your Honor, that are
13 pertinent here today, 75 percent of the countries in the world
14 do not permit abortion after the first trimester. The U.S. is
15 in a substantial minority. Knowledge regarding fetal
16 development is constantly changing.

17 THE COURT: Does the State typically look and see what
18 other countries are doing in basing its legislative findings
19 on? I mean, that is a rare circumstance where the State of
20 Mississippi looks to other countries for guidance as opposed to
21 the other 50 -- 49 states.

22 MR. BARNES: Well, they certainly did in this
23 instance, Your Honor.

24 THE COURT: Okay.

25 MR. BARNES: And because knowledge of fetal

1 development is constantly changing, constantly increasing, the
2 state of the technology and medical knowledge now is different
3 than it was at the time of *Roe*, and it's different than it was
4 at the time of *Casey*, different than at the time of *Carhart*,
5 different than last year.

6 And one of the things we know is that the viability
7 line is constantly moving and that has to be -- that is
8 anchored to technology, and that line is constantly going down.
9 The State's interest is constantly, therefore, increasing
10 because as the -- the more developed the fetus is, the stronger
11 the State's interest in protecting unborn life.

12 And the Bartlett study, which we referred to, is the
13 source of the 38 per cent per week increased risk factor. The
14 risk of second trimester abortions include infection,
15 incomplete abortion, blood clots, heavy bleeding or hemorrhage,
16 laceration or tear of the cervix, punctured uterus, injury to
17 bowel or bladder, emotional and psychological issues. Also
18 after 15 weeks, there's a greater risk of hysterectomy,
19 transfusion, or need for other reparative surgery.

20 Now, again Dr. Carr-Ellis' declaration simply says
21 this is as safe as a comparable outpatient procedures, does not
22 dispute that gestational age is the single biggest factor in
23 determining risk of abortion procedure, and it does not
24 contradict the fact that the risk increases exponentially from
25 one week to the next.

1 And, Your Honor, we believe that is enough, that is,
2 enough for the court to deny the motion.

3 THE COURT: Now, you mentioned this article that the
4 legislature relied on. In the statute itself, does the statute
5 or any of the legislative findings acknowledge the *Casey*
6 decision, acknowledge any other Supreme Court decision where
7 they -- where the U.S. Supreme Court has defined the parameters
8 of when viability begins? Because it's the viability that
9 matters most with respect to whether this abortion is going to
10 be allowed past 15 weeks or past three or four weeks. Right?

11 MR. BARNES: Well, that's certainly one of the
12 considerations the court will have in ultimately deciding the
13 case. However, we do not believe that it's the most important
14 consideration for today. We think with regards to the TRO
15 motion, which we're on here now -- and the woman who has a
16 procedure scheduled this afternoon, the issue is does this law
17 protect this woman from increased risk by preventing her from
18 having a post 15-week abortion?

19 The other main consideration is does -- we do know
20 that if a TRO issues, that there is one unborn life that the
21 legislature -- that this law was unable to protect. And in the
22 State's view, those are the critical issues for today.

23 THE COURT: Now, in the plaintiff's brief, they cite
24 from the Mississippi Department of Health's own materials as
25 they explain -- that state that at 14 to 16 weeks a fetus has

1 "no chance of survival outside of the womb." Does the State
2 stand by the Department of Health's representation as
3 represented by the -- I have not gone back and pulled that
4 particular document. I'm going to believe that the plaintiffs
5 have cited that correctly, but the State of Mississippi itself
6 says -- the Department of Heath, "a fetus from 14 to 16 weeks
7 has no chance of survival outside of the womb." So that ties
8 to the viability argument because the Supreme Court cases
9 suggest that if there is no viability, the State has no real
10 interest in telling a woman what to do with her body.

11 MR. BARNES: Your Honor, those stats that they cited,
12 it's my understanding those are from 1996. So they may still
13 be up on the website, but again medical knowledge, technology
14 has changed a lot since 1996. So --

15 THE COURT: Maybe not with the Mississippi Department
16 of Health.

17 MR. BARNES: Yes, Your Honor, but that -- and we're
18 now in litigation, and we will continue to develop the record
19 with current medical information, and we anticipate that we'll
20 be able to develop that information.

21 But, Your Honor, the cases cited -- what the
22 plaintiffs don't say in their brief is that there's only one
23 federal court in recent years that has struck down -- one
24 federal court that has struck down even a 20-week ban. That's
25 the Ninth Circuit.

1 THE COURT: The Eighth Circuit just struck down --
2 what type of ban did they strike down?

3 MR. BARNES: That was several years ago, I believe.
4 That was either Arkansas' 12-week ban -- and in that case, the
5 Eighth Circuit severely criticized -- recognized what it was
6 bound, but severely criticized the entire viability framework.
7 And I think that's going to be an issue, something that we're
8 going to go into more and more. But the bottom line, Your
9 Honor, is the viability line is constantly moving, and it's
10 never moving in favor of providing -- allowing more abortions.

11 THE COURT: But has the Supreme Court allowed that
12 line to move below 15 weeks or below 16 weeks or below 20
13 weeks?

14 MR. BARNES: Well, they have prevented -- the Supreme
15 Court in *Gonzales v. Carhart* barred the partial birth abortion
16 procedure at any time. So the answer to that extent is yes.
17 They have barred one specific procedure even for previability,
18 previability -- excuse me, Your Honor, previability abortions,
19 and the Supreme Court has not considered a case that contains
20 both the woman's right to choose to have an abortion and the
21 State's interest in protecting unborn life since *Carhart*.

22 *Hellerstedt* -- the right of the State to protect
23 unborn life was not directly implicated in *Hellerstedt*. So
24 this is in a gray area, and that intersection of those two
25 competing interests we believe ultimately are where this case

1 is going to be decided.

2 THE COURT: And that's the purpose of enacting this
3 statute. Huh? I mean --

4 MR. BARNES: Your Honor --

5 THE COURT: -- the record will be developed at some
6 point in time, I presume. But if you don't look to what the
7 State Supreme -- what the U.S. Supreme Court has said about it
8 and you -- the -- you know, outside of the 20-week ban -- well,
9 Mississippi now has a 20-week ban, according to what Mr. --
10 what the plaintiffs have argued, they have a 20-week ban, but
11 they decided to reduce that to 15 weeks. Do we know why? From
12 the legislative findings, is it because medicine has changed in
13 the last few years, viability has changed?

14 MR. BARNES: Well, Your Honor, the legislative
15 findings are the best evidence we have of what the legislative
16 intent was in passing this, and the legislature did refer to
17 Casey. He did recognize that, but also noted that in *Gonzales*
18 v. *Carhart*, the State's interest in protecting unborn life was
19 held to trump the woman's interest in having a particular
20 procedure.

21 So, again, we think that there -- plaintiffs have
22 tried this particular tactic in other states. They tried this
23 in North Carolina, where North Carolina's 20-week bill is
24 currently in litigation. And after discovery -- I believe
25 they're not at the summary judgment stage, but that has not

1 been ruled on.

2 Viability is one of the concerns, and the other
3 concern is protection of unborn life and how far has that line
4 moved and how far can the State go?

5 THE COURT: But where there is no viability, that's
6 ultimately going to be the question. Where there is no
7 viability, does the State have -- should the State's right to
8 protect something that is not viable, should the State's right
9 to protect that fetus or whatever you want to call it, that
10 unborn matter, whatever it is if it's not viable, does the
11 State have a right to trump the woman's right to have control
12 over her decisions, over her body? So reduced -- if viability
13 is but one factor, isn't it the most important factor?

14 MR. BARNES: Your Honor, it's one of the factors, but
15 another consideration here is going to be fetal pain. That's
16 part of the 20-week analysis. That's going to be part of the
17 analysis here. There is substantial evidence that at as low as
18 22 weeks there is substantial viability. More than 20 or
19 25 percent of fetuses are viable, which implies that at 20
20 weeks some are viable. So we think that -- we anticipate we
21 will we able to develop proof that shows that at least some of
22 the fetuses protected by this -- by this law are, in fact,
23 viable.

24 THE COURT: Are there any findings in the legislative
25 record of what the legislature thought the need was to go below

1 16 weeks when the only abortion clinic in the state of
2 Mississippi provided abortions up to 16 weeks?

3 MR. BARNES: Well, Your Honor, again, we have the
4 legislative findings, and there's -- it's obviously a
5 legislative determination that they feel the balancing point
6 should be 15 weeks. As you know, I don't make the laws. I
7 don't pass the laws. We in the executive branch defend the
8 laws and execute the laws. So, no, I cannot tell you
9 definitively why they chose 15 weeks in this bill at this time,
10 but we anticipate we will be able to develop substantial
11 evidence to support their conclusion.

12 THE COURT: Okay.

13 MR. BARNES: Could I have one moment, Your Honor?

14 THE COURT: Yes, you may.

15 (Short Pause)

16 MR. BARNES: In conclusion, Your Honor, we believe
17 that the State's interest in protecting women from the
18 increased risk associated with post 15-week abortions combined
19 with the State's interest in protecting unborn life is
20 sufficient justification for the court to deny the motion for
21 temporary restraining order. It's the plaintiff's burden of
22 proof both factually and legally.

23 And, again, as far as irreparable harm, at most you're
24 talking about one week that the clinic performs procedures. I
25 believe they said 70 something procedures in a year is the

1 number affected out of approximately 2600 abortions that this
2 facility performs. So it is not as if there are thousands of
3 dep- -- thousands of abortions or hundreds of abortions being
4 performed every year that this bill's going to stop. It's not.
5 The 15th, the 16th week is the only affected part. And so if
6 we're talking about harm beyond that, then we're beyond the
7 scope of the TRO motion.

8 THE COURT: Well, let me ask you specifically about
9 the one plaintiff who expects or intends to be on her way to
10 determining her destiny at 2:00 this afternoon. If the court
11 does not stay or does not enjoin this statute, the plaintiff
12 has argued that if it doesn't go forward today, she has to wait
13 eight days. She's into the 16th week. So, therefore, the
14 statute would have served its purpose, that is, that that young
15 woman would not be able to have an abortion in the state of
16 Mississippi at the clinic from the doctors whom she wants to
17 perform that procedure. Why isn't that irreparable harm to her
18 or substantial harm to her?

19 MR. BARNES: I think the issue the court has to
20 determine is whether or not the medical benefits, as the
21 statute is intended to provide, are preventing her from
22 undergoing a risky post 15-week procedure is outweighed by what
23 she views as harm.

24 THE COURT: But what evidence other than this study
25 here do we have that shows that this risky -- that shows this

1 exceptional risk, if courts and other states have struck down
2 statutes that are 20 weeks and -- anywhere between 20 and 15
3 weeks, obviously they base that on some evidence. And I know
4 we're going to ferret that out in the future, but right here
5 today, should I give the legislature that much deference? You
6 know, I don't know of any testimony -- if doctors came in and
7 testified during the hearing -- I don't even know if there was
8 a hearing.

9 And if -- a lot of stuff happens over there in the
10 legislature that just should not happen in ways that it should
11 not happen, and I'm not sure if we -- when we get down to
12 whether examining a record if there's going to be a formal
13 record, if there were proceedings, do we know if doctors were
14 brought in to testify about viability, if viability is
15 different in Mississippi because of environmental
16 circumstances, because of the standard of life of people here
17 in Mississippi is so much greater than the lives of people all
18 over the country. I mean, do we have that?

19 MR. BARNES: Well, Your Honor, I think that's not the
20 question for today. We don't have the burden of proof. The
21 legislature doesn't have the burden of proof. The defendants
22 don't have the burden of proof. On this TRO here today, the
23 plaintiffs clearly do. So the question -- we believe the
24 appropriate question is have the plaintiffs provided enough
25 specific evidence to overturn the legislative findings and the

1 information in the article we provided to you.

2 THE COURT: They say -- they argue in their papers
3 that the State has no legitimate interest in violating the
4 federal constitution which acknowledges that a woman's right
5 trumps a nonviable fetus' right. In those cases -- the U.S.
6 Supreme Court cases has said viability equals approximately 23,
7 24 weeks.

8 MR. BARNES: Your Honor, those cases depend on the
9 medical record at that time, and the line has changed even
10 since *Carhart*. And *Carhart* specifically said that some
11 previability abortions -- at least some can be restricted. And
12 if we're talking about the undue burden test in general, we're
13 talking about previability abortions because the law is clear
14 that when viability is the issue, the State's interest trumps
15 the woman's interest.

16 So again, in *Roe*, viability was 28 weeks. *Casey*,
17 sometime around 24 weeks. In *Carhart*, again they're talking
18 about, you know 23, 24 weeks. In the North Carolina case,
19 which the Center for Reproductive Rights is -- cocounsel here
20 is cocounsel there -- their expert said 24 weeks.
21 Dr. Carr-Ellis says 23 weeks. So that line is constantly
22 moving down, and it's never -- it's always moving in favor of
23 the State's authority. It's never moving the other direction.

24 So, again, that is an issue that we're going to have
25 to explore at length. But, again, we believe that for today

1 the issue is have the plaintiffs met their burden of proof?

2 And we do not believe they have and, therefore, respectfully
3 request that the court deny their motion.

4 THE COURT: What other evidence do you contend that
5 the plaintiffs need for evidence to meet their burden of proof?

6 MR. BARNES: I think they should have offered
7 specifics about increased risk. They should have produced
8 evidence that says that the risk does not go up with
9 gestational age, that evidence is lacking. That specifically
10 is what comes to mind right now, Your Honor.

11 THE COURT: Okay. Thank you, Mr. Barnes.

12 MR. BARNES: Thank you.

13 MR. MCDUFF: May I respond briefly, Your Honor?

14 THE COURT: Yes, Mr. McDuff. Yes, you may proceed.

15 MR. MCDUFF: Thank you. The irreparable harm exists
16 not only this afternoon but it exists in the coming weeks. As
17 is indicated by the papers, there are -- there will be
18 procedures performed next Wednesday and Thursday. And although
19 we don't know yet whether a person beyond the 15th week of
20 pregnancy is going to be scheduled then, it is quite possible.

21 Last year, there were 78 procedures for women beyond
22 15 weeks. That's an average of two every three weeks. So I
23 think there's a significant possibility that there will be at
24 least one patient, maybe more, who will be scheduled next week.

25 So the temporary restraining order is not just for

1 today, but for the -- yeah, for the near future and until such
2 time as a preliminary injunction hearing can be scheduled.

3 The -- Mr. Barnes talked about the absence of proof.
4 Actually we've more than carried the burden. With respect to
5 the key issue of viability, of course, again, Dr. Carr-Ellis
6 states that viability does not occur until well after 15 weeks,
7 and she says that in the normally developing pregnancy, it's
8 around 23 weeks.

9 Mr. Barnes spoke of some evidence -- it's not in the
10 record here, but he said something about viability being at two
11 weeks and maybe in some cases at 20 weeks. And even -- even if
12 there were evidence to that effect, that's far beyond the 15
13 weeks here.

14 With respect to the issue of safety, Dr. Carr-Ellis
15 states in paragraph 12 of her report, "Abortion is one of the
16 safest medical procedures in the United States. Complication
17 rate for abortion, including after 15 weeks, are similar to or
18 lower than for other outpatient procedures."

19 In the first sentence in paragraph 13, she said,
20 "Thirdly, the risk of death associated with childbirth is
21 approximately 14 times higher than that associated with
22 abortion, and every pregnancy-related complication is more
23 common among women having live births than among those having
24 abortions."

25 Now, we don't have the legislature outlawing other

1 outpatient procedures because there is some risk. But they're
2 outlawing this one, despite the fact that it's one of the
3 safest medical procedures that exist. And the reason they are
4 outlawing it here as happened in other states which tried to
5 restrict a woman's right to choose, is to prevent women who
6 become pregnant, particularly those who accidentally become
7 pregnant, to prevent them from making their own choices and
8 then to force them to bear children against their will.

9 And the Supreme Court has said since 1972 that that is
10 unconstitutional, and it's happening here. It is happening --
11 it happens time and time again in Mississippi. We see laws
12 passed to ban or restrict the rights of women to choose, and
13 quite often they are struck down by the federal courts, and
14 this one is going to have to be struck down again.

15 Mr. Barnes talked about an undue burden, the undue
16 burden test. This is beyond an undue burden. It's a ban.
17 It's a ban for every woman who has reached the 15th week of
18 pregnancy.

19 Mr. Barnes said something about the *Carhart* case.
20 Now, the *Carhart* case was not -- was not a ban on abortions
21 previability. It was a regulation that considered the validity
22 of a prohibition of a single method of abortion that is used in
23 a specific and very rare procedure. Here we have a ban on all
24 abortions after the 15th week, even though it's clear that
25 viability has not been reached.

1 And I just want to make two other points. First, with
2 respect to Mr. Barnes' statement that the medical risks
3 increase with each week that passes, even if that is true -- or
4 if that is true and if that argument is accepted as somehow
5 being legitimate, the State could continue to dial back the
6 right to choose until its eviscerated. If it increases after
7 the 15th week, it -- they can say it increases after the
8 12th week. It increases after the sixth week. It increases in
9 the first week.

10 And through this whole argument and this whole sort of
11 lashing out that they are using, they could abolish the right
12 to choose. Fortunately, their reasoning and that argument and
13 these repeated tactics we see out of legislatures in
14 Mississippi and some of the other places are -- go directly
15 against the constitutional guarantees in the Fourteenth
16 Amendment that have been enshrined in the case law since 1972.

17 Finally, Mr. Barnes spoke about saving one unborn life
18 if the temporary restraining order is denied. But the proper
19 way to look at it, as is recognized by medical science and is
20 recognized by the Supreme Court under our constitution, is that
21 it would be forcing one woman to bear a child against her will
22 simply because she is in the 15th week of pregnancy. And
23 they -- and if this statute is upheld, women will -- repeatedly
24 across the state will be denied the right to choose, will be
25 denied their rights under the constitution. This is a law that

1 is clearly unconstitutional. And for that reason, the
2 temporary restraining order should be granted.

3 THE COURT: Thank you, Mr. McDuff. Because of the
4 enormity of the issue before the court, Mr. Barnes, if you
5 would like to respond in any way -- I understand we've already
6 gone through the motion, response, rebuttal, but if there's
7 any -- because of the enormity of this case and because of what
8 the plaintiffs are requesting, I will give you an opportunity
9 to have a word. But the plaintiff again, though, will get the
10 last word.

11 MR. BARNES: Nothing further, Your Honor.

12 THE COURT: Okay. All right. Thank you all for
13 making yourselves available for this hearing. The court will
14 take this matter under advisement. The court understands what
15 the plaintiffs are requesting and the time frame at which they
16 are requesting so the court -- so thank you all for your
17 arguments. This matter is now under advisement, and the court
18 will have a ruling as soon as possible. This concludes the
19 matter. Court is in recess.

20 (Recess)

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1 CERTIFICATE OF REPORTER
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3 I, CHERIE GALLASPY BOND, Official Court Reporter, United
4 States District Court, Southern District of Mississippi, do
5 hereby certify that the above and foregoing pages contain a
6 full, true and correct transcript of the proceedings had in the
7 aforesigned case at the time and place indicated, which
8 proceedings were recorded by me to the best of my skill and
9 ability.

10 I certify that the transcript fees and format comply
11 with those prescribed by the Court and Judicial Conference of
12 the United States.

13
14 This the 6th day of June, 2018.
15

16 s/ *Cherie G. Bond*
17 Cherie G. Bond
Court Reporter
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